Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration Of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Petition of the RICA members for Declaratory Ruling Regarding Imputation of Interstate Revenue	)	WC Docket No. 11-

PETITION FOR DECLARATORY RULING

The Rural Independent Competitive Alliance ("RICA")[1] pursuant to Section 1.2 of the Commission's Rules, respectfully requests that the Commission issue a Declaratory Ruling that there is presently no binding legal obligation or mechanism that compels rural CLECs to report on FCC Form 499-A any portion of their end user revenues that are not received by them pursuant to rates explicitly designated as charges for the provision of interstate service and that end user revenues recovered pursuant to rates charged for the provision of telephone exchange service entirely within one state are intrastate revenues. In support of this request RICA states as follows:

[1] RICA is a national association of rural competitive local exchange carriers ("CLECs") that are affiliated with rural incumbent local exchange carriers ("ILECs").

I BACKGROUND

In December 2010, USAC sent letters to several rural CLEC members of RICA advising them that the 2010 FCC Forms 499-A they filed failed to report an interstate revenue portion of the revenue reported for fixed local exchange services. According to USAC "an interstate portion of fixed local exchange revenues must be identified because these revenues correspond to the costs associated with allowing customers to originate and terminate interstate calls." The USAC letters cite as their authority page 25 of the 2010 instructions to FCC Form 499-A. That page contains the statement: "filers without subscriber line charge revenue must identify the interstate portion of fixed local exchange service revenues…"[2] No codified FCC rule or FCC order was cited as supporting the form instructions.

Following exchanges of correspondence, some of these RICA members then notified USAC that they recognized that USAC believes itself bound by the Form 499-A instructions and that they would, under protest, amend their 2010 Forms 499-A (reflecting 2009 revenues) identifying a portion of their intrastate local exchange service revenues as interstate in accordance with one of the alternative methodologies suggested. The RICA members further stated that they would pursue the matter before the Commission, reserving the right, upon favorable resolution, to seek recovery of any additional contribution required of them.

The RICA members operate in a manner similar to rural incumbent local exchange carriers. They provide local exchange service to end users for a fee that allows subscribers to

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[2] The USAC letters state that carriers are permitted to impose a federal subscriber line charge on end users to recover the interstate allocated portion of local loop costs, citing 47 C.F.R. 69.152. Part 69 does not apply to CLECs, the rule cited explicitly refers to Price Cap Carriers and is mandatory rather than permissive. In any event, the RICA members have not filed a tariff with the Commission for a subscriber line charge and do not include a "federal subscriber line charge" on their end user bills. This Petition therefore is focused only on the issue of the legality of the requirement in the instructions to "identify the interstate portion of fixed local exchange service revenues."

place and receive calls within the boundaries of the exchange.[3] Local exchange service provided by the RICA members also provides the subscriber with access to long distance carriers and the ability to place and receive intrastate and interstate interexchange calls. A separate charge is made for such calls in accordance with the rate schedule of the long distance carrier. Where the RICA members function also as the long distance carrier, they report the revenues for interstate interexchange calls on FCC Form 499-A. The RICA members bill and collect interstate access charges from the providers of interstate interexchange service in accordance with tariffs filed pursuant to Section 61.26 of the Commission's rules.

The RICA members' end user rates are not regulated by either the respective state commissions or this Commission and they do not perform jurisdictional allocations pursuant to Part 36 of the Commission's Rules.[4] The local exchange facilities of the RICA members, like ILECs, incur costs to provide origination and termination of interexchange calls, but they do not intend or purport to recover any of these costs other than by means of switched access charges. Their local exchange charges are intended to recover all of the costs of providing local service except for those costs recovered through switched access charges. As noted above, the RICA members do not charge their end users a "federal subscriber line charge."

II THE WIRELINE COMPETITION BUREAU IS WITHOUT AUTHORITHY TO IMPOSE SUBSTANTIVE OBLIGATIONS ON CARRIERS BY MEANS OF FORM INSTRUCTIONS NOT ADOPTED BY THE COMMISSION AFTER NOTICE AND COMMENT

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[3] The RICA members file tariffs with their respective state commissions setting forth the rates, terms and conditions of service. The state commissions do not regulate the service or rates, however. Each of the exchanges served are located entirely within a single state, i.e. there is no interstate exchange service such as described in Section 221(b).

[4] The Commission observed in the *Universal Service Order* "Carriers other than ILECs do not participate in the formal separations process that our rules mandate for ILECs and hence do not charge SLCs nor distinguish between the interstate and intrastate portion of their charges and costs." *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) at para. 366. ("*Universal Service Order").*

A requirement that RICA members designate a portion of their revenues received for the provision of intrastate local exchange service as interstate revenue would constitute a substantive obligation that would directly affect the calculation of the RICA members' contribution obligation. To the extent the Communications Act permits the creation of such an obligation, the authority to create it lies solely with the Commission. The Commission, however, has neither conducted a notice and comment rulemaking proceeding to adopt such a rule, nor delegated such authority to the Wireline Competition Bureau. To the contrary, when the Commission consolidated the various worksheets for determining contribution obligations, it made quite clear that the Bureau was delegated authority to supervise administration of the information collection, but not to create substantive obligations:

> We reaffirm that this delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs.[5]

Contrary to this explicit limitation on its delegation, the substantive obligation to report a portion of a carrier's intrastate revenue as interstate asserted in the 2010 Form 499-A instructions at issue were apparently promulgated by the Wireleine Competition Bureau. Even if, assuming *arguendo,* the Bureau did have delegated authority to establish such an obligation, no notice and comment proceeding meeting the requirements of the Administrative Procedure Act was conducted.

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[5] *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms,* Report and Order, CC Doc. No. 98-171, 14 FCC Rcd 16602 (1999) para. 39; Order, 20 FCC Rcd 1012 (WCB 2004) para. 9 & n.31. (Bureau acknowledges this limitation on its delegation to non-substantive changes to reporting requirements, and that it is this limitation that allows it to adopt changes without a notice and comment proceeding.).

Pending before the Commission are several challenges to validity of that portion of the Form 499-A instructions adopted by the Bureau which establish asymmetrical deadlines for the filing of revisions. These challenges also raise the points that the Bureau is without authority to adopt substantive rules establishing legal obligations on carriers, and that such substantive rules must be enacted by the Commission in a notice and comment rule making proceeding.[6]

In addition to their invalidity on procedural grounds, the Form 499-A instructions are not rationally related to, or consistent with, the established rules regarding the status and regulation of CLECs. Rural ILECs, because they are subject to rate of return regulation at the state and federal level, must separate their investment and expenses between jurisdictions. This requirement was established by the Supreme Court in 1930 in order to prevent both gaps and overlaps when the same investment is subject to regulation by multiple jurisdictions.[7] Pursuant to the procedure required by Section 410(c), the Commission has adopted successive jurisdictional separations rules. The current version codified in Part 36 is mandatory for ILECs, but not CLECs.[8]

Section 36.154(c) assigns to the interstate jurisdiction 25% of the cost of an ILEC's "subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services" to the interstate jurisdiction." Section 69.104(a), explicitly applicable only to non-price cap regulated ILECs, requires that this interstate cost be

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6 *See*, AT&T, Application for Review of Action Taken Pursuant to Delegated Authority, WC Doc. No. 06-122, CC Doc. No. 96-45, Sep. 13, 2010, at 2. ("The Commission should reverse the Bureau's *Form 499 Revision Denial Order* because the deadline that the Bureau is attempting to enforce in this order was never subject to notice and comment, and the Bureau lacked the authority to promulgate a substantive change to the Commission's contribution rules.").

7 *Smith v. Illinois Bell Telephone Company*, 308 U.S. 321 (1939).

8 47 C.F.R. 36.1 *et seq.*

recovered first through a monthly charge on local exchange telephone service subscribers.[9] Section 69.104(n)(1)(ii)(C) fixes the maximum rate that can be charged, presently $6.50 per month for residential and single line business customers. Prior to the institution of SLCs and switched access charges in the 1980s, independent local exchange carriers recovered all of their interstate costs through interstate settlements with the Bell system.

The Commission has never purported to make its jurisdictional allocation or end user (SLC) rules applicable to CLECs for the purpose of determining interstate end user revenue subject to the contribution obligation.[10] Rate regulation of CLECs by the Commission is limited to Section 61.26 which controls CLEC tariffed switched access charges by use of benchmarks. CLECs, like ILECs, incur costs for the origination and termination of interstate long distance calls for interexchange carriers. There is no applicable Commission rule such as the 25% allocator for ILECs in Part 36 that specifies how CLECs are to apportion their cost, and there is no Commission rule such as the ILEC requirement in Section 69.104 that requires CLECs to recover some portion of the cost of originating and terminating interstate toll calls from subscribers to local exchange telephone service.[11]

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[9] 47 C.F.R. 69.104(a) ("A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service.")

[10] The *Universal Service Order* addressed the question of how to discount CLEC local rates for purposes of the Lifeline rules since they do not have a SLC charge to waive. The *Order* concluded that CLECs must pass through the total amount of Lifeline support as a reduction in the total amount due. This requirement was found not to impinge on state authority because "a portion of every carrier's charge can be attributed to the interstate jurisdiction." No explanation is given for this conclusion with respect to carriers for which no jurisdictional separation or mandatory SLC charge has been imposed. Indeed the paragraph goes on to recognize that the Commission could stipulate regulatory and rate structure requirements for CLECs, but chose not to do so. *Universal Service Order* at para. 366.

[11] The issue here is different from that raised by CMRS and VOIP providers that admittedly provide both intrastate and interstate service, for which the Commission established safe harbor interstate percentages in response to their claims that accounting for the jurisdiction of individual

There is thus no federal rule precluding a CLEC from determining that revenues derived from its FCC tariffed rates for interstate switched access recover all of its costs of providing interstate switched access. Nor is there a federal rule precluding a CLEC from determining that none of the revenues derived from its state tariffed rates for local exchange service are payment compensating it for the costs of providing interstate switched access.[12]

III THE COMMISSION HAS SUBSTANTIAL AUTHORITY TO ESTABLISH EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS TO SUPPORT UNIVERSAL SERVICE

The RICA members are very much aware of the statutory standard that contributions to support Universal Service should be equitable and nondiscriminatory and the importance the Commission has placed on ensuring that all service providers fulfill their obligations under the rules it has adopted.[13] The RICA members are not intending to avoid their lawful obligations or to obtain a competitive advantage. The sole purpose of this petition is to point out that such obligations must be specified by the Commission in a proper proceeding. Unfortunately, the RICA members can identify no ruling or order of the Commission establishing that for the purpose of fixing the contribution obligation of a carrier some portion of its end user revenues from the provision of intrastate communications must be considered to be interstate revenues.[14]

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calls is too burdensome. *Universal Service Contribution Methodology*, Declaratory Ruling, 25 Rcd 15651 (2010) at para. 7.

[12] Some states require CLECs to file tariffs for local exchange service. The jurisdictional discussion assumes that the local exchange service provided is entirely within one state or that Section 221(b) of the Act applies.

[13] 47 U.S.C. 254(b)(4). *Telrite Corp., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7231 (2008) at para. 26 ("…[N]on payment…remains a serious concern as demands on the USF have increased.")

[14] The Bureau has advised USAC that in determining their contribution obligations, Form 499-A filers "should do so in a manner consistent with the definitions of "information services" and "interstate telecommunications" established under the Communications Act of 1934, as amended, and the Commission's rules and orders. Letter from Jennifer K. McKee, Wireline Competition Bureau to Michelle Tilton, USAC, Apr. 1, 2009.

The solution to achieving equitable and nondiscriminatory contributions is for the Commission to conduct a proper proceeding in which the factual and legal issues as described above and in Sections I and II can be fully examined and a proper rule adopted.

IV CONCLUSION: RULING REQUESTED

On the basis of the foregoing, RICA respectfully requests that the Commission issue a declaratory ruling that there is presently no binding legal obligation or mechanism that compels RICA members to report on FCC Form 499-A any portion of their end user revenues that are not received by them pursuant to rates explicitly designated as charges for the provision of interstate service and that therefore end user revenues recovered pursuant to rates charged for the provision of telephone exchange service entirely within one state are intrastate revenues.

Respectfully submitted

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